STATE OF MICHIGAN

IN THE SUPREME COURT

TAMMY MCNEILL-MARKS,

Plaintiff/Appellee,

v

MIDMICHIGAN MEDICAL CENTER – GRATIOT,

Defendant/Appellant.

Supreme Court Case No. 154159

Court of Appeals Case No. 326606

Gratiot County Circuit Court
Case No. 2014-11876-NZ

Hon. Randy L. Tahvonen

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DEFENDANT/APPELLANT MIDMICHIGAN MEDICAL CENTER – GRATIOT'S REPLY BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

INDEX OF AUTHORITIES

INTRODUCTION

Michigan's Whistleblowers' Protection Action, MCL 15.361 *et seq*. ("WPA") became effective on March 31, 1981. In 31 years, no Michigan court has ever held that whistleblower protection applies to attorney-client communications. That changed, however, on June 16, 2016, with the Court of Appeals' published opinion below. MidMichigan's application, therefore, presents this Court with a jurisprudentially significant issue of first impression. Moreover, as explained in MidMichigan's application, the Court of Appeals' opinion is clearly erroneous and contrary to the language of the WPA.

Accordingly, this Court should grant MidMichigan's application, reverse the Court of Appeals, and reinstate the trial court's order granting summary disposition to MidMichigan. McNeill-Marks provides no substantive counterarguments in her answer. She simply repeats the Court of Appeals decision below.

ARGUMENT

I. MCNEILL-MARKS FAILS TO ADDRESS THE JURISPRUDENTIAL SIGNIFICANCE OF THE COURT OF APPEALS' DISCOVERY OF A NEW SPECIES OF WHISTLEBLOWER PROTECTION.

As noted above, the Court of Appeals issued a published opinion that purports to discover an entirely new species of whistleblower protection that has been unknown for the more-than-quarter-century that the WPA has been in effect. That new species of protection will have significant and wide-ranging effects on employers across the entire state. It will also drastically change the role of attorneys admitted to practice law in Michigan.

In her answer, McNeill-Marks nowhere disputes the significance of the Court of Appeals' opinion or even addresses the fact that it presents an issue of first impression. In light of the major significance of the Court of Appeals' departure from 30 years of Michigan law, this Court's consideration is warranted.

II. MCNEILL-MARKS IGNORES MIDMICHIGAN'S TEXTUAL ARGUMENTS.

Although McNeill-Marks repeatedly asserts that MidMichigan is asking this Court to rewrite the WPA, MidMichigan is doing no such thing. To the contrary, MidMichigan's application is grounded exclusively in the text of the WPA. It is McNeill-Marks' position that is unmoored from the statutory text.

A. The State Bar of Michigan is not a "public body" as defined by the WPA.

The entire argument McNeill-Marks advances in support of her position that the State Bar of Michigan ("SBM") is a "public body" under the WPA is that the SBM's founding statute, MCL 600.901, refers to the SBM as a "public body corporate." Answer at 11. That argument disregards the fact that "public body" is a term of art under the WPA, which is specifically defined at MCL 15.361(d). And, as MidMichigan explained at length in its application, applying various interpretive canons approved by this Court, the language of that definition does not include the SBM. See Application at § II.A.1.

While McNeill-Marks claims that this Court's decision in *State Bar of Mich v Lansing*, 361 Mich 185, 193; 105 NW2d 131 (1960), is "of no consequence" here, *Lansing* unequivocally demonstrates that the SBM is an agency that falls under the umbrella of Michigan's judicial branch. That *Lansing* addressed the SBM's tax-exempt status is of no moment. *Lansing*, *Falk v State Bar of Mich*, 411 Mich 63, 88-89; 305 NW2d 201 (1981) (RYAN, J., concurring), State Bar Rule 1 and many other authorities make it clear that the SBM is an agency of the judiciary. Indeed, MCL 600.904 is explicit: "The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan . . . ." Accordingly, the SBM cannot be an "*other* body" under MCL 15.361(d)(iv) as the Court of Appeals concluded below.

B. Attorneys are not "members" of the State Bar of Michigan as that term is used in the WPA.

McNeill-Marks provides an equally thin defense of her argument that an attorney is a "member" of the SBM for purposes of the WPA. She again returns to the SBM founding statute, this time simply highlighting the words "membership" and "members" in MCL 600.901. Answer at 15.

As is clear from this Court's decision in *Breighner v Mich High Sch Ath Ass'n*, 471 Mich 217, 232-233; 683 NW2d 639 (2004) – which involved the similar language of Michigan's Freedom of Information Act ("FOIA") – the meaning of words in a statute must be determined in context. When that context, as well as the relevant dictionary definitions, are considered here, it is clear that attorneys are not "members" of the SBM as that term is used in the WPA. And contrary to McNeill-Marks' suggestion, considering both context and the appropriate definition of a term is not only consistent with this Court's requirement that statutory interpretation begin with the language of the statute, *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), it is demanded by it. *Breighner*, *supra*; *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-57; 802 NW2d 281 (2011); accord MCL 8.3a.

McNeill-Marks' attempt to distinguish *Breighner* because it (1) involved a private entity, (2) considered different (albeit nearly identical) statutory language, and (3) considered the term "agency" instead of "member," is inapposite. The importance of *Breighner* lies in its command that words – in that case, "agency" – be interpreted in context, rather than crudely defined in a vacuum. Accordingly, just as this Court explained in *Breighner* that, as the plaintiff urged there, "the noun 'agency' *may* be used to describe a business or legal relationship between parties," as McNeill-Marks urges here, the noun "member" *may* be used to describe the relationship between attorneys and the SBM. 471 Mich at 232 (emphasis added). As *Breighner*

explained, however, "it is wholly evidence from the context . . . that this is not the sense in which the term is used." Even though the WPA and the SBR statute both use the word "member," their context supplies a different meaning.

III. EARLIER COURT OF APPEALS CASES HAVE ALREADY TACITLY REJECTED THE APPLICATION OF WPA PROTECTION TO COMMUNICATIONS WITH PRIVATE ATTORNEYS.

As explained in Section II.C. of MidMichigan's application and consistent with the fact that no court has applied whistleblower protection to attorney-client communications for more than three decades, the Court of Appeals has already rejected WPA claims involving communications to attorneys. See *Henry v City of Detroit*, 234 Mich App 405, 411; 594 NW2d 107 (1999); *Kaufman & Payton, PL v Nikkila*, 200 Mich App 250, 252-253, 257-258; 503 NW2d 728 (1993); *Vichinsky v Automobile Club of Mich*, unpublished opinion per curiam of the Court of Appeals, issued January 5, 1999 (Docket No. 203005), **Exhibit 5** to MidMichigan's application. While those cases did not directly address the issue, it is implicit in their holdings that attorneys are not "public bodies" under the WPA.

McNeill-Marks attempts to distinguish *Henry* and *Kaufman*; she simply ignores *Vichinsky*. However, in each case, the plaintiff claimed whistleblower protection for communications made to or in the presence of private attorneys, but the Court of Appeals concluded that the plaintiff could not satisfy the WPA.

In *Kaufman*, for instance, the plaintiff was a billing supervisor at a law firm. 200 Mich App at 252. She was called to be deposed in a suit against client regarding the firm's fees. *Id.* In preparing to testify, she became concerned about the legality of certain billing procedures and contacted an outside attorney. *Id.* That attorney sent two letters to the firm on the plaintiff's behalf, questioning its billing practices. *Id.* at 253. The plaintiff claimed that, as a result of those letters, the firm reassigned her to different duties, and she ultimately resigned (describing it as a

constructive termination). Four days later, the attorney who assisted her in drafting a formal letter to the Attorney Grievance Commission ("AGC"). *Id.* at 253.

The firm sued the plaintiff, and she countersued alleging, among other things, a violation of the WPA. *Id.* The issue on appeal was "whether Nikkila or anyone acting on her behalf, threatened, mentioned, or otherwise indicated that Nikkila might report [the firm] or any of its attorneys to any agency [i.e., the AGC] *before* her . . . resignation." *Id.* at 254. *Kaufman* concluded that because the plaintiff's attorney never communicated the plaintiff's intention to file an AGC grievance before the plaintiff resigned, she could not maintain a WPA claim. *Id.* at 256.

Kaufman is not significant for what it held, but what it did not. Namely, although the plaintiff communicated suspected violations of law to her attorney, no one – the plaintiff, the defendants, the trial court, or the Court of Appeals – even considered whether the plaintiff's communication to her attorney were afforded whistleblower protection. Rather, the inquiry was whether anyone had communicated the possibility that the plaintiff's attorney would file a grievance with the AGC – a "public body" – before the plaintiff was constructively terminated.

Accordingly, the Court of Appeals' opinion below is inconsistent with *Kaufman*. If a private attorney is a public body under the WPA, there would have been no need for *Kaufman* to even reach the AGC claim; the plaintiff's communication to her attorney would have been sufficient to sustain a claim.

IV. MCNEILL-MARKS DOES NOT DISPUTE THAT SHE LACKS A GOOD FAITH BASIS TO SUSPECT A VIOLATION OF LAW WHERE MCNEILL-MARKS INITIATED CONTACT WITH FIELDS.

Although McNeill-Marks' spends a significant number of pages addressing facts irrelevant to her claim, she nowhere addresses the clear and undisputed fact that – as she testified at deposition – **she initiated contact with Fields**. She said, "hello," first. As MidMichigan

explained in its application at Section III, that salutation invited a response, and Fields's contact with McNeill-Marks did not continue after Fields responded, "Hello, Tammy." Very simply, McNeill-Marks could not, then, have believed in good faith that Fields' response constituted criminal stalking.

Rather than answer to this issue, McNeill-Marks' parrots the Court of Appeals with a page-long block quote of its opinion below. Answer at 19-20. Nothing in that block quote addresses this fatal flaw in the Court of Appeals' analysis.

Accordingly, even if her private attorney is a "public body" under the WPA, and even if McNeill-Marks' privileged and private communication to him constitutes "reporting" under the MPA, McNeill-Marks cannot establish a WPA claim because there was no good faith basis to suspect that Fields had violated the law.

CONCLUSION

This case presents a jurisprudentially significant issue of first impression and involves a published Court of Appeals opinion addressing the same. For the reason alone, this matter merits the Court's consideration. Once considered, this Court will see that, as MidMichigan explained more fully in its application, the Court of Appeals opinion ignores the language of the WPA and the undisputed facts of this case. Accordingly, MidMichigan requests that this Court grant its application, reverse the Court of Appeals' decision below, and reinstate the trial court's order granting summary disposition in favor of MidMichigan.[1]

[1] McNeill-Marks is incorrect that a reversal of the Court of Appeals' opinion would necessitate remand to address her public policy claim. Answer at 21. As the Court of Appeals explained, McNeill-Marks's public policy claim arises out of the same activity as her WPA claim, and the WPA preempted such common law claims. **Exhibit 1** to MidMichigan's application at 13. That the activity in question is insufficient to establish a WPA claim does not open the door to a public policy claim; preemption closed that door.

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